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Supreme Court, U.S.
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NO. 96-1027

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PEOPLE OF THE STATE OF MICHIGAN
Petitioner,

v.

VAL RICCARDO FERNENGEL,

Respondent.

On Petition for Writ of Certiorari
to the Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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CONSTITUTIONAL QUESTIONS PRESENTED

I. WHETHER THE BRIGHT LINE RULE IN *NEW YORK V. BELTON*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981) FOR VEHICLE SEARCHES INCIDENT TO THE CUSTODIAL ARREST OF THEIR OCCUPANTS CAN BE APPLIED TO "RECENT OCCUPANTS" WHO HAVE NO POSSIBLE ACCESS TO THE VEHICLE FROM THE TIME THEY HAVE BEEN FIRST CONFRONTED BY THE POLICE?

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3 LaFave, Search and Seizure, § 7.1(c), p 446 . . . . . 3, 4

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI AS NO PRACTICAL BRIGHT LINE RULE, NOR TRUE EXIGENT CIRCUMSTANCE, JUSTIFIED THE SEARCH OF RESPONDENT'S VAN INCIDENT TO HIS ARREST, WHICH HAD BEEN INITIATED WHEN HE NO LONGER HAD ACCESS TO THE VAN.

The present case presents no significant factual controversy and a single narrow legal issue. The police in this case had no warrant and claimed no information vaguely supporting a finding of probable cause to search Respondent's van. In executing an outstanding arrest warrant, the police confronted and arrested Respondent after he had walked away from his van. Given the number of officers and their location, there was never an objective, nor subjective, belief that Respondent could gain access to his van to arm himself or destroy evidence. This was the conclusion of the Michigan Court of Appeals and it is not contested by Petitioner.

The sole issue presented is whether the bright line rule for vehicle searches incident to the custodial arrest of an occupant should be interpreted to encompass the circumstances in this case.

The United States Constitution guarantees the right to be secure against unreasonable searches and seizures. US Const, Amends IV, XIV. Searches are generally unreasonable if conducted without a search warrant issued upon probable cause. Griffin v Wisconsin, 483 US 868, 873; 107 S Ct 3164; 97 L Ed 2d 709

(1987). Exceptions to this rule have been permitted only where "the exigencies of the situation made that course imperative." McDonald v United States, 335 US 451, 456; 69 S Ct 191; 93 L Ed 153 (1948).

The only alleged exigency in the present case was the exception for a search incident to arrest. In Chimel v California, 395 US 752, 762; 23 L Ed 2d 685; 89 S CT 2034 (1968), this Court recognized an exception to the warrant requirement allowing a search incident to arrest of "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." In the case of New York v Belton, 453 US 454, 460; 101 S Ct 2860; 69 L Ed 2d 768, 775 (1981), this Court found a need to give police a bright line rule in the case of searches incident to the arrest of automobile occupants. The rule is as follows:

> "Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a con-temporaneous incident of that arrest, search the passenger compartment of that automobile."

In Michigan v Long, 463 US 1032, 1047; 77 L Ed 2d 1201; 103 S Ct 3469 (1983), this Court again recognized that "detention involving suspects in vehicles are especially fraught with danger to police officers." This Court then explained the bright line rule in Belton as one it had adopted because the courts had found "'no workable definition of "the area within the immediate control of the arrestee" when that area arguably include[d] the interior of an automobile and the arrestee [was] its recent occupant.'" Long, 463 US at 1048-1049.

The prosecutor now seeks this Court to interpret this rule to encompass the search of the vehicle of any "recent occupant" who is arrested whether or not this person ever has access to the vehicle from the time the confrontation with the police commences. The merits of this argument are revealed by answering the four questions testing the appropriateness of the Belton rule set forth in 3 LaFave, Search and Seizure, § 7.1(c), p 446:

> "(1) Does it have clear and certain boundaries, so that it in fact makes unnecessary case-by-case evaluation and adjudication? (2) Does it produce results approximating those which would be obtained if accurate case-by-case application of the underlying principle were possible? (3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach had proved unworkable? (4) Is it not readily subject to manipulation and abuse?"

The rule advocated by Petitioner is undermined by the answer to every one of these questions.

There are no clear boundaries suggested or apparent for defining "recent occupants." Whether an individual is an occupant of a vehicle when the police signal an arrest is as clear a boundary as can be found in the real world. In contrast, the Michigan Court of Appeals correctly found that,

> "If the rule is stretched to encompass the search of a vehicle that was voluntarily vacated by a person before confrontation with the police began, the 'bright-line' rule becomes hazy and uncertain. The police officer would be left to wonder what combination of temporal and spatial proximity the arrestee must have to the vehicle at the time contact was initiated to allow the search without a warrant." (Opinion, Petition at 6a).

Any attempt to define some temporal or spatial proximity, which is not pointlessly arbitrary, would necessarily require a case-by-case evaluation.

Petitioner's proposed interpretation also admittedly fails to approximate the results of an accurate application of the underlying principle. The underlying principle here is the general Chimel standard, and Petitioner has not contested the state court's conclusion that the Chimel standard does not justify this search. Thus the proposed interpretation is necessarily one which expands the scope of permissible searches beyond any principled justification. Specifically, in this case there was no objective, or subjective, reason to believe the search conducted was necessary to protect the officers.

The argument of Petitioner is that the search in this case is no less inconsistent with the Chimel standard than searches of an arrested occupant's car after they have been handcuffed and placed in a squad car. But this is disingenuous. As discussed in LaFave treatise, supra at 449, such searches provide a legitimate reason to question the problematical end boundary of the Belton rule. But such searches are justified, if at all, solely by the need for a bright line rule. It is a non sequitur to claim that just because the interest in a bright line rule permits some searches in the absence of any true exigent circumstances, that the line should consequently be blurred to permit other similarly unprincipled searches.

The third question in the LaFave treatise is whether the rule precludes the need for a case-by-case evaluation. As shown in the first answer, Petitioner's argument provides no boundary which can eliminate the need for a case-by-case evaluation.

The most revealing of these four questions is whether the rule permits abuse or manipulation. Petitioner's entire policy argument is premised on implicit right of the police to search the vehicles of arrested persons without a warrant, probable cause or any plausible exigent circumstance. What this Court is asked to do is simply countenance such searches so that the police are not tempted to unnecessarily endanger themselves to justify searches for which they have no legitimate constitutional authority. It is not surprising that Petitioner's list of principles underlying the Belton rule does not include this Court's duty to protect citizens from unconstitutional police rifling through their personal possessions. Petitioner's argument suggests that rules of this court are not to inform the police of the limits of their authority so that they do not unwittingly exceed them, but rather to abet their circumvention of citizens' constitutional rights.

Petitioner argues that the Federal Courts of Appeal are divided on this issue. It is true that several cases have included statements consistent with Petitioner's interpretation. But an examination of those cases quickly reveals such broad statements were unnecessary to correctly decide those cases. Moreover, they contain no policy nor legal arguments supporting the extension of the Belton rule to the facts of this case.

Two cases were cited in which the police first confronted a person who had already left their car. In both United States v Snook, 88 F3d 605 (CA 8, 1996), and United States v Willis, 37 F3d 313, 317 (CA 7, 1994), the person arrested was still immediately adjacent to a vehicle which had its door open. Both searches were

easily justified as either a plain view search or as a search incident to arrest applying the Chimel standard. Despite broadly stated dicta, the relevance of the Belton rule in each was, at best, limited to defining the scope of the search of the passenger compartment given the arrestee's arguable access to it. Cf. Michigan v Long, supra at 1049.

Petitioner cites United States v Adams, 26 F3d 702, 705 (CA 7, 1994), as standing for the proposition that only a "positive link" is necessary between an arrested person and the vehicle the police wish to search. But this phrase was dicta of the most obvious sort. There was no authority of reason given for a "positive link" being sufficient to justify the search. Instead the court merely noted the lack of such a link as a further demonstration of weakness of the claimed right to search.

Other cases such as United States v Franco, 981 F 2d 470, 472-473 (CA 10, 1992), demonstrate the variety of police interactions with vehicle occupants which can lead to custodial arrests. While they may vary in the nature of the interaction prior to the formal arrest and in the apparent access of the arrested person at the moment of the formal arrest, they share a common factor absent in the present case. Each of these cases falls into the bright line category of cases in which the police face the irrefutable danger of interacting with a vehicle occupant who they ultimately arrest. In the present case no such dangerous circumstance existed.

CONCLUSION

It is both impossible and unnecessary to create a bright-line definition of "recent" occupants who have voluntarily left their vehicle prior to any confrontation with police. The only principled test for the necessary case-by-case analysis in such cases is the general Chimel standard. The Belton rule properly defines the scope of vehicle searches of recent occupants who arguably have access at some time during their confrontation with the police. The rule cannot justify a search where, as here, the police confront a "recent occupant" who never has arguable access to the vehicle.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE BY FIRST CLASS MAIL

RONALD E. STEINBERG, counsel for Respondent, states that on January 27, 1997, he mailed a copy of the following:

- Motion for Leave to Proceed In Forma Pauperis
- Respondent's Brief in Opposition
- Proof of Service

to: Thomas Casey
Solicitor General
P.O. Box 30212
Lansing, MI 48909

by placing these documents in a properly addressed envelope with fully prepaid postage affixed, and placing the envelope in a U. S. Postal Service box located at the Penobscot Building, 645 Griswold, Detroit, Michigan.

Ronald E. Steinberg

RONALD E. STEINBERG
Counsel of Record
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Dated: January 27, 1997

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January 27, 1997

Clerk
Supreme Court of the United States
Washington, DC 20543

Re: **Val Riccardo Fernengel** v **People of the State of Michigan**
Supreme Court No. 96-1027

Dear Clerk:

Enclosed for filing with the Court please find the original and (10) copies of the following:

- Motion for Leave to Proceed In Forma Pauperis
- Respondent's Brief in Opposition
- Proof of Service.

Thank you for your assistance in this matter.

Sincerely,

Ronald E. Steinberg
Assistant Defender
Counsel of Record for Respondent

RES.lac

Enclosures

cc: Michigan Solicitor General
Mr. Val Riccardo Fernengel
File

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